

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Docket No. C2012-2

**UNITED STATES POSTAL SERVICE
SURREPLY IN OPPOSITION TO AMERICAN POSTAL WORKERS UNION, AFL-CIO
MOTION FOR AN EMERGENCY ORDER**

Pursuant to the United States Postal Service's (Postal Service) Motion for Leave and 39 C.F.R. § 3001.21(b), the Postal Service files this surreply in response to the American Postal Workers Union, AFL-CIO's (APWU) Reply to USPS Opposition to APWU Motion for an Emergency Order filed on June 21, 2012 (Reply).

Preliminary Statement

The APWU's Reply—a reply for which the Commission's rules make no allowance, and for which APWU sought no leave to file—fails to rebut the two bases that the Postal Service provided in support of its position that emergency injunctive relief is not available to APWU: (1) Congress did not grant the Commission the authority to issue an injunction in connection with a section 3662 proceeding; (2) even if the Commission had such authority (which it does not), the APWU has failed to establish that it would be entitled to injunctive relief because they are not likely to prevail on the merits; they will not suffer irreparable harm absent injunctive relief; the balance of the equities favors the Postal Service under these circumstances; and a preliminary injunction here is not in the public interest.¹

¹ United States Postal Service Answer in Opposition to American Postal Workers Union, AFL-CIO Motion for an Emergency Order, PRC Docket No. C2012-2 (June 20, 2012) ("Answer").

Argument

I. IN ITS REPLY, THE APWU HAS AGAIN FAILED TO ESTABLISH THE AVAILABILITY OF EMERGENCY INJUNCTIVE RELIEF

In its reply, the APWU utterly fails to rebut any of the Postal Service's arguments that show that the emergency injunctive relief that it seeks through the emergency motion is unavailable in this context. For this reason alone its motion must be denied.

Specifically, with regard to the question of whether the Commission has authority to grant injunctive relief, the APWU's citation to *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C. Cir. 1967), does not support an argument that the Commission has the power to implement preliminary injunctive relief, or demonstrate that the Postal Service's reliance on *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962), is "misplaced." The cease and desist order in *Persian Gulf* was issued after the Federal Maritime Commission (FMC) issued a final order on the merits finding that the Shipping Act had been violated.² As such, the order in that case was fundamentally different from the order considered in *Trans-Pacific*, which was a preliminary order issued *pending* a final determination on the merits, and was thus predicated on a finding of "irreparable injury" rather than a finding that the Shipping Act had been violated.³

² *Persian Gulf*, 375 F.2d at 337-338 (noting that the FMC had made a final determination that Section 15 of the Act was violated).

³ *Persian Gulf*, 375 F.2d at 338 (noting that *Trans-Pacific* found that "neither Section 15 nor 22 supported the pendente lite cease and desist order issued by the Commission"); *Trans-Pacific*, 302 F.2d at 876-880. See also *Cargill, Inc. v. Fed. Maritime Comm'n*, 530 F.2d 1062, 1071-72 (D.C. Cir. 1976) (noting that *Trans-Pacific* found that the FMC could not "issue a restraining order pendente lite where the only justification advanced was a finding of irreparable injury and there was no finding of a violation of the Act," and distinguishing that circumstance from a case where the FMC "has found a violation of [the Act]."); *Pacific Coast European Conf. v. Fed. Maritime Comm'n*, 537 F.2d 333, 337-338 (9th Cir. 1976) (noting the difference between an "illegal interlocutory injunction" issued "pending disposition" of the complaint held impermissible in *Trans-Pacific*, and a decision predicated on determination that the Act was violated).

Thus, nothing in *Persian Gulf* undercuts the Postal Service's position that *Trans-Pacific* demonstrates that the Commission, like the FMC, lacks the authority to issue a preliminary injunction in complaint proceedings. Rather, APWU's reliance on *Persian Gulf*, and its claim that *Trans-Pacific* is not relevant to its Motion, simply demonstrates that APWU is no longer looking for a preliminary injunction, as it claimed in its Emergency Motion, but is instead seeking a summary decision on the merits.⁴ As such, the APWU's motion requesting injunctive relief must be denied.

II. THE APWU FAILS TO DEMONSTRATE THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION EVEN IF THE COMMISSION HAD AUTHORITY TO GRANT IT

Because of the APWU's total failure in its reply to address the Postal Service's contention that it would not be entitled to injunctive relief even if the Commission had the authority to grant it, the APWU is essentially conceding that it is not entitled to the relief requested in its emergency motion. For this reason alone, the motion must be denied.

Further, the APWU cannot succeed on the merits as its Reply perpetuates its misunderstanding of section 3661. The APWU maintains that the Postal Service cannot go forward with its network consolidation plan until it *receives* an advisory opinion from the Commission, but it tellingly cites no language in Section 3661 that even arguably supports that position. The language is clear: the Postal Service must “*submit* a proposal ... *requesting* an advisory opinion on the change,” and must do so within a

⁴ See, e.g., APWU Reply at 1 (“But this case is ripe for the Commission to issue a final order on the Complaint.”).

“reasonable time” before implementation.⁵ Where the language of a statute is clear and unambiguous, that must be the end of the inquiry.

The APWU asks the Commission to ignore the language of Section 3661(b), asserting that a plain-language interpretation “negates the role of the PRC and neuters the Commission and Section 3661.”⁶ The Postal Service explained in its response why that is not so, however,⁷ and the APWU does not attempt to rebut those arguments. Moreover, there is nothing absurd about the way that Congress structured the statute. It furthers the principle underlying Title 39 that the responsibility for making major operational decisions to effectuate the Postal Service’s statutory mission rests with the Postal Service’s Board of Governors, and authority must be commensurate with responsibility. Chairman Goldway has correctly recognized the limitations on the Commission’s powers under Section 3661,⁸ and the APWU points to no statutory language undermining the Chairman’s view. If the APWU believes that Congress has struck a poor balance of the relative roles of the Commission and the Postal Service, then that argument should be addressed to Congress.

The APWU next suggests that the Postal Service has not waited a “reasonable time” between proposing its network rationalization plan in December 2011 and implementing the first phase of it in July 2012. Relying on the Commission’s regulation that a proposal be filed “not less than 90 days” before implementation, 39 C.F.R. § 3001.72, the APWU argues that this phrase establishes a floor (90 days) but not a

⁵ 39 U.S.C. § 3661(b) (emphases added).

⁶ APWU Reply at 3.

⁷ USPS Response at 14-15.

⁸ See USPS Response at 14 & n.48.

ceiling (unlimited), and that the Commission can establish as “reasonable” any period of time it chooses – *i.e.*, that parties can dispute, and the Commission can decide, what is “reasonable” on a case-by-case basis during the pendency of a given request.

This argument is inconsistent with the text and structure of the statute. Section 3661(b) is directed to the Postal Service and sets forth what it must do at the time it submits a request. If 90 days were only a floor and not a ceiling, then the Postal Service would never have any way of knowing, for any given service change, how far in advance it would be required to submit its request. The Postal Service thus would have no way of complying with the statute.

Additionally, if 90 days were only a floor, then that rule would frustrate the Postal Service’s ability to plan and budget for such changes because it could not know in advance when the changes would be implemented or the financial impact that such changes would be expected to have. As a regulated entity that is expected to comply with a statutory or regulatory directive, the Postal Service is entitled to know in advance what it is required to do.⁹ A rule requiring the Postal Service to file a request 90 days before implementation (or more, if it chooses) achieves that notice and certainty while being consistent with the text of Section 3661 and its implementing regulations. The rule advocated by the APWU, which allows the Commission to decide after filing how much time is reasonable, does not.¹⁰

⁹ See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 2012 WL 2196779, at *9 (U.S. June 18, 2012) (“It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance”).

¹⁰ The remainder of the APWU’s reply is devoted to a brand new argument that the Postal Service’s original proposal in December 2011 fell “far short” of the evidentiary requirements in 39 C.F.R. § 3001.74(a) & (b) – and thus, presumably, was not a valid request for an advisory opinion under Section 3661 at all. This argument is, to put it mildly, in considerable tension with its position that the Postal Service’s original filing was complex, voluminous and intricate. In any event, it is far too late to raise this

Conclusion

Based upon the foregoing, the Commission should deny the APWU's Motion for an Emergency Order.

Respectfully submitted,

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new argument, in two different respects. First, it was not presented in the APWU's Motion, and has therefore been waived. *See, e.g., EchoStar Communications Corp. v F.C.C.*, 292 F.3d 749, 754 (D.C. Cir. 2002). Second, more than *six months* have passed since the Postal Service submitted its proposal, and it is far too late to raise this issue now.